Chow Kok Keong v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–96 OF 1993
CHONG SIEW FAI CJ (SABAH & SARAWAK), EDGAR JOSEPH JR FCJ AND NH CHAN JCA
14 NOVEMBER 1997

Criminal Law *— Dangerous drugs — Trafficking — Definition of trafficking — Quantity of drugs in excess of statutory minimum — Whether defence of self-consumption available — Dangerous Drugs Act 1952 ss 2 & 39B(1)(a)*

Criminal Law *— Dangerous drugs — Trafficking — Conviction for trafficking — Whether conviction was sustainable — Whether court had the power to substitute with conviction for possession — Dangerous Drugs Act 1952 s 39B(1)(a)*

The Appellant was convicted in the High Court, Kota Bharu, for trafficking, on his own behalf, in a dangerous drug, to wit, heroin weighing 86.6gm, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), and sentenced to death. The Appellant was arrested by a party of police personnel led by ASP Mohd Dzuraidi ('Dzuraidi'). On the night the Appellant was arrested, he had met a friend named Tan Kwan Seng ('Ah Seng') at Karaoke No 1, Setapak ('the Karaoke Lounge'). The defence of the Appellant was that the bag which contained the heroin had been handed to him by Ah Seng who said that it contained some bread and iced tea. The Appellant claimed that at the time and place of his arrest, when cautioned and questioned by Dzuraidi about the bag, he had there and then disclosed his defence to Dzuraidi and that, as a result, he had led the police party directly from the scene to the Karaoke Lounge to trace Ah Seng but to no avail. The defence of the Appellant was not a bare denial but an explanation indicating that someone else, not he, was the trafficker.

In the High Court, the Judge ruled that the prosecution had successfully invoked the presumption of possession under s 37(d) of the Act against the Appellant. It followed, the Judge said, that because the weight of the heroin was in excess of 15gm, as certified by the Government Chemist, the presumption of trafficking under s 37(da)(i) of the Act was also successfully invoked by the prosecution. In rejecting the defence of the Appellant, the Judge had relied heavily on what he thought was the belated disclosure of his defence by the Appellant. The Judge had also relied on the definition of trafficking in s 2 of the Act and the Supreme Court case of *Teh Geok Hock v PP* [1989] 3 MLJ 162 in concluding that the definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping.

Counsel for the Appellant pointed out that there was some corroboration of the defence case, appearing in the testimony of Dzuraidi himself, that after being cautioned, at the time and place of

arrest, the Appellant had led the police party directly to the Karaoke Lounge in search of Ah Seng. Counsel for the Appellant also argued that the presumption of trafficking under s 37(da) had been rebutted but conceded that because the Appellant was in passive possession of the drugs, this was an appropriate case for this Court to substitute a conviction for possession in contravention of s 6 and punishable under s 39A(2) of the Act.

Held, allowing the appeal, quashing the conviction and substituting the death sentence with a sentence of 18 years' imprisonment and 10 strokes of whipping:

(1) In making the strong findings of fact adverse to the defence, the Judge had overlooked the earlier testimony of Dzuraidi which corroborated the testimony of the Appellant that it was at the time and place of his arrest that the Appellant had disclosed his defence. This indicated a lack of 'due appreciation' of the evidence and so, was a serious misdirection by way of non-direction for, had the Judge correctly directed himself in this regard, he might well have looked at the defence more sympathetically (see pp 346I and 347A).

(2) In considering and rejecting the defence of the Appellant, the Judge had relied on the definition of trafficking in s 2 of the Act. The Judge appears to have overlooked the decision that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be available even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case (see pp 347I and 348A–C); *Cohen Lorraine Philis & Anor v PP* [1989] 3 MLJ 289 and *Ng Chai Kem v PP* [1994] 2 MLJ 210 followed; *Teh Geok Hock v PP* [1989] 3 MLJ 162 not followed.

In the particular circumstances of the present case, bearing in mind that the Judge had erred in his handling of the facts, when considering the case for the defence, the undue stress he had placed on s 2 of the Act, and the way the arguments developed before the Court, the conviction for trafficking under s 39B of the Act was unsustainable and the right course for this Court to take was to substitute a conviction for possession in contravention of s 6 and punishable under s 39A(2) of the Act (see p 349C–D).

[Bahasa Malaysia summary

Perayu telah disabit di Mahkamah Tinggi, Kota Bharu, kerana mengedar, bagi pihak sendiri, dadah berbahaya, yakni heroin sebanyak 86.6gm, bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'), dan dijatuhkan hukuman mati. Perayu telah ditangkap oleh sepasukan kakitangan polis yang diketuai oleh ASP Mohd Dzuraidi ('Dzuraidi'). Pada malam Perayu ditangkap,

A dia telah berjumpa dengan seorang rakan bernama Tan Kwan Seng ('Ah Seng') di Karaoke No 1, Setapak ('Bilik Karaoke tersebut'). Pembelaan Perayu adalah bahawa beg yang mengandungi heroin telah diserahkan kepadanya oleh Ah Seng yang mengatakan bahawa ia mengandungi roti dan teh ais. Perayu mendakwa bahawa pada masa dan di tempat tangkapannya, ketika diberikan amaran dan disoal oleh Dzuraidi mengenai beg itu, dia telah memberikan pembelaannya kepada Dzuraidi di situ juga dan bahawa, akibatnya, dia telah membawa pasukan polis terus dari tempat kejadian ke Bilik Karaoke tersebut untuk mengesan Ah Seng tetapi tidak berjaya. Pembelaan Perayu bukanlah penafian kosong tetapi penjelasan yang menunjukkan bahawa orang lain, dan bukan dirinya, adalah pengedar.

Di Mahkamah Tinggi, Hakim memutuskan bahawa pihak pendakwa telah berjaya menggunakan anggapan milikan di bawah s 37(d) Akta tersebut terhadap Perayu. Hakim berkata, ini bermakna bahawa oleh kerana berat heroin melebihi 15gm, seperti yang diperakui oleh Ahli Kimia Kerajaan, pihak pendakwa juga berjaya menggunakan anggapan pengedaran di bawah s 37(da)(i) Akta tersebut. Dalam menolak pembelaan Perayu, Hakim telah sedikit sebanyak bergantung pada apa yang beliau fikirkan adalah pendedahan lewat pembelaan oleh Perayu. Hakim juga telah bergantung pada takrifan pengedaran dalam s 2 Akta tersebut dan kes Mahkamah Agung *Teh Geok Hock v PP* [1989] 3 MLJ 162 dalam menyimpulkan bahawa takrifan 'pengedaran' dalam Akta tersebut adalah luas dan termasuk bukan sahaja membeli dan menjual, tetapi juga membawa, menyembunyi dan menyimpan.

Peguam Perayu menegaskan bahawa terdapat sokongan dalam kes pembelaan, yang menonjol dalam testimoni Dzuraidi sendiri, bahawa selepas diberikan amaran, pada masa dan di tempat tangkapan, Perayu telah membawa pasukan polis terus ke Bilik Karaoke tersebut untuk mencari Ah Seng. Peguam Perayu juga berhujah bahawa anggapan pengedaran di bawah s 37(da) telah dipatahkan tetapi mengakui bahawa oleh kerana Perayu berada dalam milikan pasif dadah itu, ini merupakan suatu kes yang wajar untuk Mahkamah ini menggantikan sabitan atas milikan bertentangan dengan s 6 dan boleh dihukum di bawah s 39A(2) Akta tersebut.

Diputuskan, membenarkan rayuan, membatalkan sabitan dan mengganti hukuman mati dengan hukuman penjara 18 tahun dan 10 sebatan:

(1) Dalam membuat keputusan fakta kukuh yang bertentangan dengan pembelaan, Hakim telah terlepas perhatian testimoni lebih awal Dzuraidi yang menyokong testimoni Perayu bahawa ia adalah pada masa dan tempat tangkapannya bahawa Perayu memberitahu pembelaannya. Ini menunjukkan kekurangan 'penilaian yang patut' atas keterangan dan jadi, merupakan penyalaharahan yang serius secara tiada arahan kerana, andainya Hakim telah mengarah diri dengan betul berkaitan hal ini, beliau

mungkin lebih bersimpati terhadap pembelaan (lihat ms 346I dan 347A). A

(2) Dalam mempertimbangkan dan menolak pembelaan Perayu, Hakim telah bergantung pada takrifan pengedaran dalam s 2 Akta tersebut. Hakim seolah-olah tidak mengendahkan keputusan bahawa dalam pendakwaan untuk pengedaran dadah berbahaya, B pembelaan penggunaan untuk diri sendiri mungkin boleh didapati sekali pun di mana kuantiti dadah yang terlibat melebihi jumlah minima statutori yang ditetapkan di bawah s 37(da) Akta tersebut, tetapi sama ada ia boleh berjaya akan bergantung pada keadaan tertentu setiap kes (lihat ms 347I dan 348A–C); *Cohen Lorraine Philis & Anor v PP* [1989] 3 MLJ 289 dan *Ng Chai Kem v PP* C [1994] 2 MLJ 210 diikut; *Teh Geok Hock v PP* [1989] 3 MLJ 162 tidak diikut.

Dalam keadaan khusus kes ini, dengan mengingati bahawa Hakim terkhilaf dalam menguruskan fakta-fakta, ketika mempertimbangkan kes pembelaan, tekanan berlebih-lebih yang D diletakkan oleh beliau pada s 2 Akta, dan cara hujah-hujah berkembang di hadapan Mahkamah, sabitan untuk pengedaran di bawah s 39B Akta tersebut tidak boleh kekal dan jalan yang betul untuk diambil oleh Mahkamah ini adalah untuk menggantikan sabitan atas milikan bertentangan dengan s 6 dan boleh dihukum di bawah s 39A(2) Akta tersebut (lihat ms 349C–D).] E

Notes

For cases on the Dangerous Drugs Act (Malaysia) ss 2 and 39B, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 30–33 and 83–101. F

Cases referred to

Akin Khan bin Abdul Rahman v PP [1987] 2 MLJ 217 (refd)
Cohen Lorraine Philis & Anor v PP [1989] 3 MLJ 289 (folld)
Gooi Loo Seng v PP [1993] 2 MLJ 137 (refd) G
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (refd)
Ng Chai Kem v PP [1994] 2 MLJ 210 (folld)
PP v Yuvaraj [1969] 2 MLJ 89 (refd)
R v Bundy 5 Cr App R 270 (refd) H
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132 (refd)
Teh Geok Hock v PP [1989] 3 MLJ 162 (not folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 12, 37(d), (da)(i), 37A, 39A(2), I 39B(1)(a)

Appeal from: Criminal Application No 45–9 of 1993 (High Court, Kuala Lumpur)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Azahar Mohamed (*Kamaruzaman bin Abdul Jalil* with him) (Deputy Public Prosecutor) for the respondent.

Edgar Joseph Jr FCJ (delivering the judgment of the court): The Appellant had been convicted in the High Court, Kota Bharu, for trafficking, on his own behalf, in a dangerous drug, to wit, heroin weighing 86.6gm, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952, ('the Act'), and sentenced to death. It was alleged that the offence was committed on the night of 7 January 1993, in the vicinity of Flat Block B 91, Jalan Tun Razak, Kuala Lumpur.

The case for the prosecution, in outline, was this: On 7 January 1993 at about 10pm, ASP Mohd Dzuraidi (PW6) ('Dzuraidi') had received certain information and without further ado, led a party of police personnel from the Cawangan Anti Dadah, Sentul, consisting of Det Cpl Idris, Det Cpl Rosli, Det L/Cpl Hadzir, Det L/Cpl Ramli, Det Const Mohd Adnan (PW7) ('Adnan'), D/Const Mohd Jidi, D/Const Mohd Fauzi, D/Const Zulkifli and D/Const Chang Sing Kong, for the purpose of laying an ambush in the vicinity of flats in the Pekeliling area, Kuala Lumpur, near Flat No B 91.

On arrival at the scene, the police party had split into four groups and took up strategic positions.

At about 10.30pm, Dzuraidi saw a motorcycle bearing registration number WBP 5958 coming into the ambush area, ridden by the Appellant, and proceeding very slowly. Dzuraidi then emerged from his position and, at a distance of about five feet from the Appellant, ordered the latter to stop, saying 'berhenti', and at the same time, raising his hand. When the Appellant pulled up, Dzuraidi noticed that he had dropped a yellow coloured plastic bag (P6) ('the bag') from his left hand. Dzuraidi then moved swiftly towards the Appellant and announced his identity, whereupon, the Appellant had attempted to run. Dzuraidi then instructed Adnan and L/Cpl Hadzir to arrest the Appellant. In the ensuing struggle, the motorcycle fell to the ground and the Appellant was overpowered and handcuffed. Dzuraidi then picked up the bag, showed it to the Appellant and exposing its contents, which consisted of two packets, being P9 and P12, wrapped in Chinese newspaper both of which contained plastic packets each of which in turn contained a pinkish powdery substance, suspected to be heroin, the subject matter of the charge, being P9 and P12 ('the heroin'). Dzuraidi then administered the caution under s 37A of the Act, to the Appellant, who elected to remain silent.

Apart from the bag, Dzuraidi also seized from the Appellant a pager, the motorcycle, a crash helmet, cash amounting to RM554, a wallet, and a key chain attached to which were four little keys.

The place where the Appellant was stopped was brightly lit and, apart from the bag, no other plastic bag was recovered from the scene.

From the scene, the Appellant and the articles seized were brought to the Sentul Police Station for preliminary investigation and this resulted in

the Appellant leading Dzuraidi and his party to Karaoke No 1, Setapak ('the Karaoke Lounge'). From there, the police party proceeded to the Appellant's house No 244 A Jalan Air Jerneh, Setapak, where a search resulted in nothing incriminating being recovered. From there, Dzuraidi brought the Appellant back to the Sentul Police Station. Once there, Dzuraidi marked the exhibits, and initialed the bag and the packets which contained the heroin. Dzuraidi then made a police report after which he locked the exhibits concerned in his steel cabinet and kept the key to it.

On 8 January 1993, at about 1.15 pm, Dzuraidi handed over the Appellant and all exhibits seized, including the bag and the heroin, to Insp Annadorai.

When cross-examined by Mr Karpal Singh, Dzuraidi was emphatic that he had set up the ambush at the place in question after receiving information and that the bag he had seized was the very bag which the Appellant had dropped moments before his arrest. Dzuraidi admitted that he had gone to the Karaoke Lounge in search of a male Chinese named Ah Seng.

But, Dzuraidi emphatically denied the suggestion of Counsel, that at the time he was arrested the Appellant was carrying bread in the carrier of the motorcycle, and iced tea which, together with the bag, hung from the handle of the motorcycle.

The learned trial Judge said that having observed the demeanour of Dzuraidi he was satisfied that this officer was a witness of truth. The Judge remarked that he was unshaken in cross-examination.

The testimony of Dzuraidi, the Judge noted, was supported by Adnan in material respects.

Subsequently, the suspected heroin was examined and analysed by the Government Chemist who confirmed Dzuraidi's suspicions, when he certified that it was indeed heroin, a dangerous drug within the meaning of s 2 of the Act, weighing 86.6gm.

Being satisfied that at the time of his arrest the Appellant had in his custody and under his control the bag which contained heroin, the Judge ruled that the prosecution had successfully invoked the presumption of possession under s 37(d) of the Act against the Appellant. It followed, the Judge said, that because the weight of the heroin was in excess of 15gm, as certified by the Government Chemist, the presumption of trafficking under s 37(da)(i) of the Act was also successfully invoked by the prosecution.

For the foregoing reasons, the Judge ruled that the prosecution had succeeded in establishing a prima facie case against the Appellant and, he accordingly, called upon the Appellant to enter upon his defence.

The case for the defence, as deposed to by the Appellant from the witness box, was this:

The Appellant admitted that he had been arrested at the time and place mentioned in the charge but not in the circumstances related by the prosecution witnesses. Going back a little, the Appellant said that on 6 January 1993 he had received a telephone call from a friend named Tan

Kwan Seng (aka Ah Seng) to meet at the Karaoke Lounge on the following night. He said that he had known Ah Seng for one year prior to his arrest and that Ah Seng had visited him at home on four or five occasions. Ah Seng lived at No 30, Jalan 11/27 B, Desa Setapak, Kuala Lumpur, and the Appellant had also been to Ah Seng's house. The Appellant went there riding his motorcycle WBP 5958. On the night in question, the Appellant said that he and Ah Seng had had refreshments at the Karaoke Lounge and that while having refreshments, Ah Seng had told the Appellant that his (Ah Seng's) friend would be carrying out some repair work on his (Ah Seng's) house. Ah Seng then asked the Appellant to go ahead and wait for him at the car park near Block B 91, Jalan Tun Razak, Kuala Lumpur ('the car park'), because he had a little personal matter to settle first, after which he would rejoin him so that both could go to the house which required repairs.

According to the Appellant, before he left the Karaoke Lounge to go to the car park, Ah Seng had handed him a loaf of bread, iced tea and a yellow plastic bag which contained something. Ah Seng had told the Appellant that the bag contained food. The Appellant said that P6 was the same as the bag which Ah Seng had given him. The Appellant then proceeded to the car park bringing along with him the bread which had been placed in the carrier and which was tied with a rubber band while the iced tea and the bag were hanging from the right handle of the motorcycle.

On arrival at the car park, the Appellant pulled up, and then, a number of persons pounced on him and attempted to apprehend him. Because he was frightened, the Appellant attempted to escape but eventually he was overpowered and handcuffed.

Immediately upon arrest, while still at the car park, Dzuraidi showed him the bag and questioned him, asking: 'Who gave the yellow plastic bag?' The Appellant replied 'Tan Kwan Seng gave it to me'. Immediately after this, he was asked by Dzuraidi to lead the way to the Karaoke Lounge, which he did, proceeding there *directly* from the scene, but on arrival there, Ah Seng was not to be seen. The Appellant *denied* that from the scene, he had first been taken to the Sentul Police Station by Dzuraidi and that only after being interrogated there, did he lead the police party to the Karaoke Lounge to look for Ah Seng.

The first witness for the defence was the wife of the Appellant Ho Yin Ling. She supported the Appellant with regard to the telephone calls the Appellant had received from Tan Kwan Seng on 6 January 1993 and with regard to the Appellant going to the Karaoke Lounge on the night of 7 January 1993 to meet with Tan Kwan Seng. She also confirmed that prior to the Appellant's arrest, Tan Kwan Seng had called on the Appellant on four or five occasions.

The Judge observed that under the law, the burden of rebutting the statutory presumptions aforesaid was on the defence but the extent of that burden was on the balance of probabilities. In support, the case of *PP v Yuvaraj* [1969] 2 MLJ 89 was cited.

Next, the Judge referred to local cases such as *Akin Khan bin Abdul Rahman v PP* [1987] 2 MLJ 217 (SC) and *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 (SC) which applied *Yuvaraj*.

The Judge then said that before proceeding to consider more closely whether the Appellant knew about the contents of the bag it would be appropriate for him to consider whether Tan Kwan Seng (Ah Seng) existed or not. Having studied the testimony of the Appellant and his wife, the Judge was satisfied that this person did exist. He observed that although Ho Yin Ling was the wife of the Appellant, her testimony about Ah Seng could be accepted.

The Judge noted that Mr Karpal Singh had contended that police investigations into this case were unsatisfactory because insufficient steps had been taken to verify the explanation of the Appellant concerning the role of Tan Kwan Seng (Ah Seng).

Although the police had not carried out further investigations concerning Ah Seng, the Judge repeated that he was satisfied that Tan Kwan Seng (Ah Seng) did exist but considered that apart from the testimony of the Appellant, there was no evidence to show that Ah Seng was connected with the heroin recovered from the bag.

The Judge recognized that the issue was whether Ah Seng had handed the bag containing the heroin to the Appellant. With regard to this, the Judge said that it was necessary to study the testimony of the Appellant and to compare it with the testimony of the prosecution witnesses, especially Dzuraidi and Adnan, and having done so, he found the explanation of the Appellant unacceptable. Furthermore, the Judge found that the story that Ah Seng had handed the Appellant the bag was not reasonable and was an invention on the part of the Appellant to save his own skin. The Judge found that the Appellant knew that the bag contained drugs. When the Appellant was stopped he had dropped the bag and had attempted to run. Why did he drop the bag and attempt to run when he was stopped by Dzuraidi if he really did not know the contents of the bag, particularly, since he had claimed that he thought that the bag contained food given to him by Ah Seng? This, the Judge remarked, was not the conduct of a man who really did not know the contents of the bag, but on the contrary, it was because he knew the contents of the bag to be drugs that he had dropped the bag.

The Judge went on to observe that the Appellant had attempted to contradict the testimony of Dzuraidi that at the time of his arrest, when cautioned and questioned by Dzuraidi, the Appellant made no reply.

Having considered the totality of the evidence adduced by the prosecution and the defence, the Judge found that at the time and place of his arrest, when he was cautioned the Appellant had made no reply. This finding, the Judge considered, was amply supported by the testimony of Dzuraidi and Adnan, bearing in mind that neither of these witnesses had any motive to lie on this point.

The Judge further found that the Appellant was not telling the truth when he testified that it was at the time and place of his arrest that he

A informed Dzuraidi that it was Ah Seng who handed him the bag but conceded that there was a possibility that the Appellant did so inform Dzuraidi while he was being interrogated at the Sentul Police Station, before the party proceeded to the Karaoke Lounge.

The Judge also drew attention to the definition of trafficking under the B Act. Section 2 of the Act provides:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.

C The Judge then noted that the effect of the above section, according to the Supreme Court case of *Teh Geok Hock v PP* [1989] 3 MLJ 162 (per Hashim Sani CJ at p 163), was this:

> The definition of trafficking is wide and includes not only buying and selling, but also carrying, concealing and keeping.

D The Judge next found that it was clear that the Appellant was carrying the bag which contained the heroin. Because the weight of the heroin was more than 15gm, the presumption of trafficking under s 37(da) arose.

The Judge was thus satisfied that the evidence adduced by the defence had failed to rebut the statutory presumptions aforesaid. Accordingly, he E found the Appellant guilty, entered conviction, and passed the mandatory sentence of death as required under s 39B(2) of the Act.

In the barest outline, the defence of the Appellant was that the bag which contained the heroin had been handed to him by Ah Seng who said that it contained some bread and iced tea, in the circumstances detailed by F him. The Appellant claimed that at the time and place of his arrest, when cautioned and questioned by Dzuraidi about the bag, he had there and then disclosed his defence to Dzuraidi and that, as a result, he had led the police party directly from the scene to the Karaoke Lounge to trace Ah Seng but to no avail.

G Thus, the defence of the Appellant was not a bare denial but an explanation indicating that someone else, not he, was the trafficker.

Before us, the conviction was attacked by Mr Karpal Singh, chiefly on the ground that the way in which the Judge dealt with the defence was unsatisfactory. In particular, he argued that the Judge's criticism that the Appellant had made a belated disclosure of his defence was not justified H having regard to a particular portion in the testimony of Dzuraidi himself to which we shall refer anon.

More particularly, Counsel stressed that the Judge himself had found, contrary to the contention of the Deputy Public Prosecutor during the cross-examination of the Appellant, that Ah Seng did exist.

I Next, Counsel pointed out that there was some corroboration of the defence case, appearing in the testimony of Dzuraidi himself, that after being cautioned, at the time and place of arrest, the Appellant had led the police party directly to the Karaoke Lounge in search of the Ah Seng. In

support, Counsel directed our attention to the following passage in the testimony of Dzuraidi:

> Apabila tertuduh sampai di tempat ia ditangkap saya yang nampak pertama kali. Selepas ditangkap saya beri amaran — tujuan memberi amaran untuk mendapatkan kepastian berkenaan barang yang dirampas. *Selepas itu saya dan anggota-anggota polis pergi ke Karaoke No 1 Setapak.*
>
> (When the accused arrived at the place where he was arrested it was the first time I saw. After arrested, I cautioned him — the purpose of caution is to obtain confirmation regarding nature of the articles seized. *After that I and a police party proceeded to Karaoke No 1 Setapak.*) (Emphasis added.)

This was a clear indication that when cautioned at the time of his arrest, the Appellant must have disclosed his defence, for how else does one account for the police party proceeding from the scene directly to the Karaoke Lounge in Setapak? This was a point in the evidence for the prosecution which told strongly in favour of the Appellant since, having regard to the common course of human conduct, someone who is highly aroused is not likely to have had time to construct lies.

It is true, that at a later stage, this witness resiled from what he had said, and asserted that when cautioned and questioned at the time of his arrest, the Appellant had refused to reply, whereupon the police took the Appellant to the Sentul Police Station where he was interrogated by Dzuraidi, and it was only subsequently, that the Appellant led the police to the Karaoke Lounge in search of Ah Seng but to no avail. The fact, however, remains that at an earlier stage of his cross-examination, Dzuraidi had said something very different and that no attempt had been made by him to explain the contradiction although it was most material. Thus, at the very least, there was, clearly an ambiguity on this particular point in the testimony of Dzuraidi, and there should be no ambiguity upon a matter where the liberty — indeed the life — of a subject is involved.

In this context, it is of crucial importance to note, that in rejecting the defence of the Appellant, the Judge had relied heavily on what he thought was the belated disclosure of his defence by the Appellant. Here is what his Lordship said:

> I am satisfied and I so find that at the time and place of his arrest, when he was cautioned, the accused made no reply.

And, in the next para of his Grounds of Judgment, he said:

> I find that the accused was not telling the truth when he testified that at the time and place of his arrest it was Ah Seng who had handed him the bag but there is a possibility that the accused did so inform ASP Mohd Dzuraidi while he was being interrogated at the police station Sentul before they proceeded to the Karaoke No 1.

It is obvious, that in making these strong findings of fact adverse to the defence, the Judge had overlooked the earlier testimony of Dzuraidi (quoted above) which corroborated the testimony of the Appellant that it was at the time and place of his arrest that the Appellant had disclosed his defence. In our view, this indicated a lack of 'due appreciation' of the

A evidence (See *R v Bundy* 5 Cr App R 270, per Pickford J, applied in *Gooi Loo Seng v PP* [1993] 2 MLJ 137 at p 142) and so, was a serious misdirection by way of non-direction for, had the Judge correctly directed himself in this regard, he might well have looked at the defence more sympathetically.

B In this situation, it was certainly open to the defence to contend that if the whole matter had been probed, the Judge might have felt unable to accept the police evidence at all on the ground that if the testimony of the police witness was unreliable as to *when* the Appellant had made disclosure of his defence, their testimony as to *other matters*, for example, about the bread and the iced tea and about the Appellant dropping the bag might C also be unreliable. Had such a submission been made, it might or might not have carried weight, but if upheld, it would have led to an outright acquittal.

But, as we have already indicated, Mr Karpal Singh who argued this appeal with commendable propriety and restraint, did not take this position D but was content to concede that at the close of the case for the prosecution it had been proved by affirmative evidence that the Appellant had been 'found in possession' of the drugs, and that the presumption of trafficking under s 37(da) of the Act had been correctly invoked by the Judge, though for the wrong reason. (See the Judgment of this Court in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273 where it was held that it is not permissible E to pile the presumption of trafficking under s 37(da) upon the presumption of possession under s 37(d) of the Act.) Mr Karpal Singh therefore confined his contention to arguing that the presumption of trafficking under s 37(da) had been rebutted but conceded that because the Appellant was in passive possession of the drugs, this was an appropriate case for this Court to F substitute a conviction for possession in contravention of s 6 and punishable under s 39A(2) of the Act.

Now, it is undoubtedly the law, that in a criminal case, we are in no way bound to act on a concession of the sort made by Mr Karpal Singh in this case but, that we can do so, in an appropriate case, we have no doubt. G In this context, we need no more than refer to the numerous instances, when in appeals against conviction for the offence of trafficking in dangerous drugs in contravention of s 39B of the Act, the prosecution had conceded that the conviction could not stand, but that a conviction for some lesser offence, such as, for possession under s 6 or even s 12 of the Act, be substituted, and upon the defence agreeing to such a course, we had H invariably, acted on the concession, without query, and substituted a conviction for such lesser offence.

To revert to the Grounds of Judgment, in considering and rejecting the defence of the Appellant, the Judge had, as we have said, relied on the definition of trafficking in s 2 of the Act set out earlier herein.

I And, as we have also noted, the Judge had relied on the Supreme Court case of *Teh Geok Hock v PP* [1989] 3 MLJ 162, where the Court briefly considered the effect of the definition of trafficking aforesaid and, in particular the Court observed:

> The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffick' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffick' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

The Judge, however, appears to have overlooked the later Supreme Court case of *Cohen Lorraine Philis & Anor v PP* [1989] 3 MLJ 289, where the Court (per Abdul Hamid LP) held that in a prosecution for trafficking in dangerous drugs, a defence of self-consumption might be *available* even where the quantity of drugs involved was in excess of the statutory minimum prescribed under s 37(da) of the Act, but whether it could succeed would depend upon the particular circumstances of each case. And, in the subsequent case of *Ng Chai Kem v PP* [1994] 2 MLJ 210, the Supreme Court followed *Cohen*.

In our view, both *Cohen* and *Ng Chai Kem*, have severely watered down *Teh Geok Hock* in so far as it implies that passive possession or self-administration can never be a defence to a charge of trafficking under s 39B of our Act. Having considered this point afresh, we preferred the views expressed in *Cohen* and *Ng Chai Kem* to those in *Teh Geok Hock* which we regarded as oversimplistic. We would add that apart from the general consideration that the drugs legislation is a piece of highly penal legislation and therefore any ambiguity in it should be resolved in favour of the subject, in accordance with long established canons of construction, it is pertinent to note that the definition of 'trafficking' aforesaid comes under s 2 of the Act, the very first line of which reads:

> In this Act, *unless the context otherwise requires* ... .

In our view the context of s 37(da)(i) which says:

> any person who is found in possession of —
>
> (i) 15 grammes or more in weight of heroin; ...
>
> otherwise than in accordance with the authority of this Act or any other written law, *shall be presumed, until the contrary is proved, to be trafficking in the said drug*;

does '*otherwise require*' (italics supplied). If this were not so, the provisions of s 37(da) which specifically confer upon the accused *the right* to rebut the presumption of trafficking arising from being found in possession of dangerous drugs in excess of the statutory minimum, would be an empty hypocrisy.

It is also pertinent to note that in the Federal Court case of *Syed Ali bin Syed Abdul Hamid & Anor v PP* [1982] 1 MLJ 132, the Court referred to the qualification provided in s 2, that is, that the definition of terms listed thereunder are subject to the requirement of context. Consequently, the Court held that if the context appears to have intended a different meaning from that appearing in the definition, the meaning given in s 2, will not apply. In so holding, the Federal Court said (at p 134):

> Whilst we may speak of a person in possession of a house, or a place or a premises as an 'occupier' thereof, it is against common usage that any person in control of a motor car is referred to as an occupier of it, although he may properly be described as being in possession of the motor car. The use of the words 'occupier of the premises' instead of the words 'person in possession of the premises' in para (g) of s 37 must have been attributable to the intention of the legislature to restrict the definition of 'premises' to its usual and ordinary meaning as understood in common usage and not to give an extended meaning thereto so as to include a motor car.

To sum up, therefore, in the particular circumstances of the present case, bearing in mind, especially, the point that the Judge had erred in his handling of the facts, when considering the case for the defence, the undue stress he had placed on s 2 of the Act, and the way the arguments developed before us, in our view, the conviction for trafficking under s 39B of the Act was unsustainable and the right course for this Court to take was to substitute a conviction for possession in contravention of s 6 and punishable under s 39A(2) of the Act.

We had, therefore, unanimously allowed the appeal, quashed the conviction, set aside the sentence of death, and substituted, in lieu thereof, a conviction under s 6 and a sentence of 18 years imprisonment with effect from date of arrest and the minimum 10 strokes of the rottan.

Appeal allowed, conviction quashed and death sentence substituted with a sentence of 18 years' imprisonment and 10 strokes of whipping.

Reported by David Lai